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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1141

UNITED STATES OF AMERICA,

Petitioner

V.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW; JURISDICTION; CONSTITUTIONAL AND STATUTORY PROVISIONS

The Government's brief accurately refers to (1) the reported and unreported decisions below, (2) the jurisdictional basis for this Court's review, and (3) the relevant constitutional provision, statute and regulation involved.

QUESTION PRESENTED

Whether Milanovich v. United States, 365 U.S. 551, always requires a new trial when a defendant is convicted of the mutually exclusive offenses of bank robbery and possession of the proceeds of that robbery and, if it does so require, whether it should be overruled.

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

On March 6, 1974, according to the testimony of a number of government witnesses, the Bank of Loganville, Georgia was robbed by two armed robbers that entered the bank about 10:30 A.M. wearing ski masks. (T. 28, 39, 45, 50 and 55). In addition to the two armed robbers that entered the bank, there was a third masked person outside the bank who was driving what was reported to be a getaway car for the three. (T. 71, 84). During the course of the robbery, one robber held a number of employees at bay in the lobby of the bank with a pistol and the other robber vaulted the teller cage and emptied the cash drawers, taking an estimated $7,501.73. (T. 105).

When the two robbers entered the bank, they were yelling and giving orders (T. 55) and the robber who vaulted the teller cage ordered the tellers to lay down against the wall while he emptied the cash drawers. (T. 40, 43). Ms. Brooks, a teller at the bank, testified that this robber spoke in a deep voice and otherwise characterized the voice of the robber as gravely. (T. 40, 43).

On departing the bank the robbers encountered Officer Cody of the Loganville police and exchanged

gunfire with the officer. (T. 69). An eyewitness to the robbery, Robert Alton Webb, testified that the driver of the car had long brown hair and it might have been a woman. (T. 92). A number of marked bills described as bait money were taken from the bank by the robbers. (T. 107).

Billy Wayne Davis, Billy Sunday Birt and Bobby Gene Gaddis were charged with having committed the above described robbery. Billy Wayne Davis pled guilty to the charges and appeared at the trial of Birt and Gaddis as a witness for the government. (T. 157-204).

At the trial of Birt and Gaddis, F.B.I. Agent Kane testified that after receiving a report from Toccoa, Georgia, that Mrs. Mary Davis, the wife of Billy Wayne Davis, had deposited some of the bait money from the robbery in a Toccoa bank (T. 115) he visited the Davis home whereupon he discovered additional bait money in the Davis' freezer. (T. 135). Mrs. Mary Davis testified that she received the money from her husband, Billy Wayne Davis. (T. 145).

In the prosecution of its case, the government presented some twenty-two witnesses and of these witnesses only one, co-defendant Billy Wayne Davis, was able to identify either Birt or Gaddis as being present at the Bank of Loganville the day it was robbed. Furthermore, at the trial, a number of lay witnesses testified that Birt and Gaddis were in Winder, Georgia, on the date and at the time the Bank of Loganville, Georgia, was robbed. (T. 205, 211, 231, 251). In addition Birt and Gaddis each testified on their own behalf that they did not participate in the robbery. (T. 217, 237).

REASONS FOR NOT GRANTING THE WRIT

After a general introduction wherein petitioner suggests to this Honorable Court that justice should take a back seat to judicial economy they present a four-part brief in support of their 'Reasons for Granting the Writ' (petitioner's brief pp. 6-14). Part 1 merely relates to the Court the holdings of Heflin v. United States, 358 U.S. 415, (1959) and Milanovich v. United States, 365 U.S. 591 (1961). Part 2 suggests that because of a conflict in lower circuit courts decisions on the Heflin-Milanovich Rule this Court should grant certiorari. Part 3 is concerned with an effort to place this Court in the position of the jury requesting that the possession count be set aside in favor of the greater sentence of robbery. And, in Part 4 petitioner prays that if this Court does not find a conflict sufficient to grant the Writ then Milanovich should be re-examined. Respondents submit the following points for this Court's consideration.

1. There is no conflict in the lower courts.

a. United States v. Tyler, 466 F.2d 920 (9th Cir. 1972) certiorari denied, 409 U.S. 1045 (1972). Petitioner asserts that the Ninth Circuit would have decided the case at bar differently from the court below and they cite the Tyler decision in support of their contention. The Tyler court concluded that there is a distinction between using the words receiving and possession in the indictment in an attempt to circumvent the Heflin-Milanovich Rule. As pointed out in Judge Duniway's well reasoned dissenting opinion in that case, this approach clearly will not hold water. Tyler, supra, 925. Further, a more

recent decision, United States v. Faleafine, 492 F.2d 24 n.4 (9th Cir. 1974) casts some doubt on whether Tyler is the current approach the Ninth Circuit would give the aforestated rule. In short, the Ninth Circuit is the only circuit to even suggest this approach and more properly the response in the other circuits has been that of the Third Circuit in United States v. Roach, 321 F.2d, 1 (3rd Cir. 1963) wherein the appellate court directed a dismissal of the possession count and a new trial on the other counts. The court noted that it was a distinction without a difference that the defendant was charged with 'possession and concealment' in violation of 18 U.S.C. 2113(c) rather than with 'receiving' since the rationale of Heflin clearly indicates that sub-section (c) seeks to punish a new group of wrongdoers and not the accused bank robbers themselves.

b. Ethridge v. United States, 494 F.2d 351 (6th Cir. 1974), certiorari denied November 18, 1974 No. 74-5959. This case does not present a conflict either in that the Sixth Circuit concluded, as a discretionary matter, not to consider the issue before the court questioning the merger of counts for robbery and possession. Moreover, that case can be distinguished because the greater sentence of fifty years for murder was not under attack. Here, respondent has attacked the greater sentence of twenty-five years for bank robbery. A consideration of Ethridge is not appropriate here.

c. New trial not required where jury convicts of robbery or possession but not both. Petitioner cites

United States v. Dixon, 507 F.2d 683 (8th Cir. 1974) and United States v. Sharpe, 452 F.2d 1117 (1st Cir. 1971) in support of the foregoing proposition. Respondents do not contend otherwise but clearly this line of reasoning is inapplicable as suggesting a conflict in that the facts in Dixon and Sharpe are not in point. Respondents were convicted of both robbery and possession.

d. New trial is required where the jury is not told that it must not convict of both possession and the robbery itself. Petitioner concludes its conflict presentation by noting to this Court that the Fourth and Fifth Circuits require the result reached in the case below; we concur and would add to that list the following circuits with appropriate case citation.

THIRD CIRCUIT: United States v. Roach, 321 F.2d 1 (3rd Cir. 1963); United States v. Welty, 426 F.2d 615 (3rd Cir. 1970) (recognizing rule).

FOURTH CIRCUIT: United States v. Harris, 346 F.2d 182 (4th Cir. 1965); United States v. Lawrenson, 196 F. Supp. 838 (DC Md, 1961) (recognizing rule), affd. 298 F.2d 880, (4th Cir., 1961); cert. den. 370 U.S. 947.

FIFTH CIRCUIT: Baker v. United States, 357 F.2d 11 (5th Cir., 1966) (recognizing rule); Thomas v. United States, 418 F.2d 567 (5th Cir. 1969); Grant v. United States, 424 F.2d 273 (5th Cir. 1970) (recognizing rule), overruled on other grounds; United States v. Woodall, 438 F.2d 1317 (5th Cir. 1971),

cert. den. 403 U.S. 933; United States v. White, 440 F.2d 978 (5th Cir. 1971) (recognizing rule); Rose v. United States, 448 F.2d 389 (5th Cir. 1971)

SIXTH CIRCUIT: Matlock v. United States, 309 F. Supp. 398 (DC Tenn. 1970) (recognizing rule).

SEVENTH CIRCUIT: United States v. Parker, 181 F. Supp. 73 (DC Ind. 1960) (recognizing rule), affd 283 F.2d 862 (7th Cir. 1960), cert den 366 U.S. 937.

EIGHTH CIRCUIT: United States v. Jones, 418 F.2d 818 (8th Cir. 1969), (recognizing rule).

NINTH CIRCUIT: Keating v. United States, 413 F.2d 1028 (9th Cir. 1969); Clermont v. United States, 432 F.2d 1215, (9th Cir. 1970), cert den 402 U.S. 997, but see United States v. Tyler, 446 F.2d 920 (9th Cir. 1972).

TENTH CIRCUIT: Glass v. United States, 351 F.2d 678 (10th Cir. 1965) (recognizing rule); Jenkins v. United States, 361 F.2d 615 (10th Cir. 1966)

There is not a conflict on the issue presented in the case now pending before this Court, and therefore petitioner has failed to meet the requirement of presenting to this Court an issue of such a degree and significance that this Court should grant certiorari in the present case.

2. It is not necessary to re-examine Milanovich.

In Part 4 of petitioner's brief, they urge this Court

to grant the Writ for the purpose of re-examining Milanovich. A close view of the legislative history of 18 U.S.C. 2113(c) indicates that a re-examination of Milanovich is not necessary because the lower court in this instance properly applied the statute. Here, respondents rely on this Court's analysis of the legislative history of 2113(c).

> "Subsection (c) of §2113, with which we are now primarily concerned, came into the law in 1940. The legislative history is meagre. The Senate Report (S Rep No. 1801, 76th Cong. 3d Sess) is captioned 'Punishment for Receivers of Loot From Bank Robbers." The Report states, 'This bill would add another subsection to further make it a crime, with less severe penalties (maximum $5,000 fine and 10 years imprisonment, or both) to willfully become a receiver or possessor of property taken in violation of the statute,' p. 1. Similarly the House Report states 'Present law does not make it a separate substantive offense knowingly to receive or possess property stolen from a bank in violation of the Federal Bank Robbery Act, and this bill is designed to cover the omission.' HR Rep No. 1668, 76th Cong, 3d Sess, p.1.
>
> This clue to the purpose of Congress argues strongly against the position of the Government. From these Reports it seems clear that subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense. But in view of the legislative history of subsection (c) we think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." Heflin, supra. 419.

A recent decision by this Court clearly demonstrates the importance of legislative history in interpreting a law and determining its appropriate application. See

Iannelli v. United States, 73-64, decided March 25, 1975, 43 Law Week 4423 at 4427 and 4430.

In brief, the procedure suggested by petitioner, i.e., remanding to the district court for re-sentencing is inappropriate rather, a new trial is required in light of the ratio decidendi of this Court and the lower circuit courts' application of Heflin and Milanovich and the legislative history of the statute in question.

The question presented to this Court by petitioner is of no national import, there is no conflict of decisions in the lower circuit courts, and there is no necessity for clarification of the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief upon Mr. Robert H. Bork, Solicitor General, by forwarding a copy of same to his office in Washington, D. C., with correct postage affixed thereto.

This 11th day of April, 1975.